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Supreme Court, U.S.
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No. 02-1850

IN THE

Supreme Court of the United States

WINIFRED N. COTTER, ET AL.,

Petitioners,

v.

THE CITY OF BOSTON, MASSACHUSETTS ASSOCIATION OF MINORITY LAW ENFORCEMENT OFFICERS, DENNIS A. WHITE, AND HAROLD WHITE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS, MASSACHUSETTS ASSOCIATION OF MINORITY LAW ENFORCEMENT OFFICERS, DENNIS A. WHITE, AND HAROLD WHITE, IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether the petition should be denied where there was no genuine dispute of material fact concerning a public employer's decision to consider race in choosing among candidates for promotion to police sergeant with the same certification scores; where the First Circuit Court of Appeals correctly applied the governing law in affirming the district court's judgment that a public employer's race-conscious decision was justified by a compelling governmental interest and narrowly tailored to serve that interest; and where the First Circuit's decision does not conflict with the decision of any other circuit court of appeals.

Whether the petition should be denied where the First Circuit Court of Appeals correctly applied the governing law in determining that the petitioners lacked standing to pursue claims for damages under 42 U.S.C. § 1983 where this decision raises no conflict among the circuit courts of appeal and where the petitioners had no meritorious claims, even if they did have standing.

Whether the petition should be denied where no issue of state law was presented to or ruled upon by the First Circuit Court of Appeals and where there is no other basis for review by this Court of any issues of state law.

CORPORATE DISCLOSURE STATEMENT

The Massachusetts Association of Minority Law Enforcement Officers is a corporation that has no parent corporation and is not owned in whole or in part by any publicly held company.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 323 F.3d 160 (1st Cir. 2003) and is reproduced at Petitioners' Appendix ("Pet. App.") 5a-30a. The opinion of the district court is reported at 193 F. Supp. 2d 323 (D. Mass. 2002), and is reproduced at Pet. App. 31a-98a.

JURISDICTION

The judgment of the First Circuit Court of Appeals was entered on March 25, 2003. The First Circuit denied a petition for rehearing and suggestion for rehearing en banc on May 28, 2003. The petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

PROVISIONS AT ISSUE

Section One of the Fourteenth Amendment to the United States Constitution, which provides, in pertinent part, as follows:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Section Two of Article III of the United States Constitution, which provides, in pertinent part, as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.

42 U.S.C. § 1983, which provides, in pertinent part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[1/]

[1/]As discussed below, no issue arising under Mass. Gen. Laws ch. 31 is properly before this Court.

STATEMENT OF THE CASE

There is no basis for further review by this Court. The First Circuit Court of Appeals correctly applied to the undisputed facts – including unrebutted expert testimony – this Court's long-standing principles of strict scrutiny in ruling that a decision of the Boston Police Department to promote three African-American police officers to the rank of sergeant was narrowly tailored to serve a compelling governmental interest. This decision does not conflict with any decision of another court of appeals.

In a non-dispositive ruling, the First Circuit also correctly applied the governing law in determining that the petitioners lacked standing to pursue claims for damages under 42 U.S.C. § 1983. This decision also does not conflict with any decision of another court of appeals. Moreover, the First Circuit determined the merits of the petitioners' claims after finding that the petitioners had standing to seek immediate promotion.

The petitioners' complaint asserts no state law claims; nor were any issues of state law presented to or ruled upon by the First Circuit. Furthermore, 42 U.S.C. § 1983 does not provide a cause of action for alleged violations of state law. Accordingly, no issues that may arise under state law are properly before this Court.

In view of the foregoing, the petition for writ of certiorari should be denied.

A. Prior Proceedings

The petitioners seek review of a judgment of the First Circuit Court of Appeals, affirming in part and reversing in part an order of the United States District Court for the District of Massachusetts, holding that the promotions of three African-American police officers by the Boston Police Department

("BPD") were lawful and not in violation of the United States Constitution.

The initial complaint named as defendants the BPD, BPD Commissioner Paul F. Evans; BPD Director of Human Resources Edward P. Callahan, and the Commonwealth of Massachusetts, Executive Office for Administration and Finance, Human Resources Division ("HRD"). The complaint was later amended to name only two defendants, the City of Boston (the "City") and James J. Hartnett, Jr., in his official capacity as HRD Personnel Administrator ("Hartnett").

On October 20, 1999, the district court denied a motion to dismiss filed by Hartnett. *See Cotter v. City of Boston*, 73 F. Supp. 2d 62 (D. Mass. 1999). Thereafter, the First Circuit reversed the district court's denial of a motion to intervene as party defendants filed by respondents Massachusetts Association of Minority Law Enforcement Officers and BPD Sergeants Dennis A. White and Harold White (collectively, "MAMLEO"). *See Cotter v. MAMLEO*, 219 F.3d 31 (1st Cir. 2000), *cert. denied*, 531 U.S. 1072 (2001).

On January 14, 2002, the district court dismissed Hartnett from the case after Hartnett agreed to settle with the petitioners. *See* Pet. App. at 99a-100a. As part of the settlement, Hartnett and the petitioners stipulated to certain alleged facts, which they sought to have entered as an order of the court. *Id.* The City and MAMLEO contested many of the stipulations, none of which constitutes an established fact. The district court refused to enter the stipulations as an order of the court. *Id.* at 100a.

After discovery -- as well as a *Daubert* hearing, at which the district court accepted MAMLEO's expert, Dr. Kathleen Lundquist -- the parties filed cross motions for summary judgment. On March 22, 2002, the district court granted summary judgment for the City and MAMLEO and denied plaintiffs' cross-motion for summary judgment. *See* Pet. App.

96a-98a. On March 25, 2003, the First Circuit Court of Appeals affirmed the district court's order granting summary judgment for the City and MAMLEO, *see* Pet. App. at 24a, but reversed the district court's determination that the petitioners had standing to pursue a claim for damages, as well as the district court's decision to retain jurisdiction over subsequent hiring and promotional decisions by the BPD, *id.* at 27a.

On April 21, 2003, the petitioners filed a Petition for Rehearing En Banc, which the First Circuit denied as untimely on May 28, 2003. *See* Pet. App. 1a-2a. On June 19, 2003, the petitioners filed the instant petition for writ of certiorari.

B. Factual Background

1. The History Of Race Discrimination Within The Boston Police Department

The history of race discrimination within the BPD is well documented in the consent decree entered in *Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Dep't*, No. 78-529-McN (D. Mass. 1980) (the "MAAAP Consent Decree"), as well as in a number of court cases (and filings submitted therein), beginning with *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972), in which the First Circuit affirmed a district court's finding that the BPD discriminated against African-American applicants through the use of entry-level testing procedures that favored Caucasian candidates. *See Boston Police Superior Officers Fed'n v. City of Boston*, 147 F.3d 13, 20 (1st Cir. 1998).

a. The MAAAP Consent Decree

In 1978, the Massachusetts Association of Afro-American Police ("MAAAP"), MAMLEO's predecessor-in-interest, sued the BPD for race discrimination against minority police officers in its promotional practices. The suit was settled on September 16, 1980 by the district court's entry of the

MAAAP Consent Decree, the parties to which were the BPD, the Massachusetts Department of Personnel Administration ("DPA," now HRD), MAAAP, and certain public employees and officials. *Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Dep't*, No. 78-529-McN (D. Mass. 1980). *See Superior Officers*, 147 F.3d at 15.

Since the MAAAP Consent Decree was entered, the First Circuit has, on four occasions, considered challenges to the Decree's legality and to certain promotion practices undertaken pursuant to or consistent with its terms. *See Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Dep't*, 780 F.2d 5 (1st Cir. 1985) (rejecting Superior Officers' motion to intervene to attack the Decree); *Stuart v. Roache*, 951 F.2d 446 (1st Cir. 1991) (rejecting reverse-discrimination challenge to the Decree); *Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Dep't*, 973 F.2d 18 (1st Cir. 1992) (dismissing challenge to the 1991 amendment to the Decree); *Boston Police Superior Officers Fed'n v. City of Boston*, 147 F.3d 13 (1st Cir. 1998) (rejecting reverse-discrimination challenge to race-conscious promotion, holding that, while the Decree did not apply to the challenged promotion, the promotion nonetheless constituted lawful affirmative action). These decisions, along with the filings submitted therein, establish the following undisputed facts.

The plaintiff class certified by the MAAAP Consent Decree comprised "[a]ll present and future black sworn officers in the [BPD]." *Superior Officers*, 147 F.3d at 15. As of March 2, 1978, when the MAAAP action was commenced, there was only one (.45%) black sergeant among the 222 BPD sergeants. *Id.*; *Stuart*, 951 F.2d at 448. The parties to the Decree traced the small number of eligible black applicants for BPD supervisory positions to entry-level testing practices that had been found to violate Title VII in *Castro v. Beecher*, 334 F. Supp. 930 (D. Mass. 1971), *aff'd in part, rev'd in part*, 459 F.2d 725 (1st Cir. 1972). *See Stuart*, 951 F.2d at 452.

One principal element of relief contained in the Decree was the requirement that BPD promotional exams be validated in accordance with the Equal Opportunity Employment Commission's Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.1-1601.18 (the "Guidelines"). *Superior Officers*, 147 F.3d at 15. The Decree established affirmative-action goals and timetables for promotions to sergeant, the threshold BPD supervisory position. *Id.*

b. Implementation of the Decree

Although the MAAAP Consent Decree contemplated yearly promotions of officers from validated promotional exams, the BPD failed to give any validated exams during the first five years of the Decree, up to and including its scheduled expiration date of September 16, 1985. *See Superior Officers*, 147 F.3d at 15; *Stuart*, 951 F.2d at 448. Between 1985 and 1990, the BPD successfully administered just one validated exam, falling short of the Decree's goals. *Id.*

In 1985, MAAAP successfully sought to have the district court extend the Decree until 1990 and modify the Decree's numerical goals to reflect the increased number of qualified African-American candidates in the BPD. *See Superior Officers*, 147 F.3d at 15. However, by 1990, the BPD had given only one "validated-fair" exam, and the number of blacks promoted still fell short of the Decree's goals. *Id.* As a result, the BPD and MAAAP jointly requested that the court extend the decree until the BPD could give one more "validated-fair" exam in June, 1991. *Id.*

c. The 1991 Amendment to the Decree

Prior to the trial on MAMLEO's claims concerning the 1991 exams, the parties submitted to the district court an Agreement to Amend the Consent Decree ("Amendment"), and requested that it be entered in settlement of MAMLEO's claims. *Superior Officers*, 147 F.3d at 15-16. The parties also submitted

to the court a separate contract between the parties regarding the design, administration, and validation of the 1992 lieutenants' and captains' exams ("Agreement"), which was intended to obviate the need to resolve judicially the long-standing dispute as to whether the Decree's validation requirements applied to those ranks.

On December 3, 1991, the district court approved the Amendment and explicitly ruled that the Decree's validation requirements applied, not only to promotional exams for the rank of sergeant, but also to exams for promotion to the ranks of lieutenant and captain. *Superior Officers*, 147 F.3d at 16. The First Circuit dismissed the Superior Officers' appeal from this order on ripeness grounds. *See Superior Officers*, 147 F.3d at 16. Among other things, the First Circuit noted that the district court's ruling explicitly permitted the Superior Officers to enter an application for a further amendment to the Decree, should the facts so warrant. *Id.* at 21.

d. MAMLEO's challenge to the 1992 Exams

Pursuant to the terms of both the Amendment and the separate Agreement among MAMLEO, the BPD and the DPA, MAMLEO retained a testing expert, Jeffrey W. Daum, Ph.D., to act as liaison for the parties concerning the validity of the 1992 exams. Daum, as well as experts from the BPD and the DPA, jointly developed a civil service exam for the position of lieutenant that was administered in September, 1992. The results of that test, which was "content validated" according to the Guidelines, 29 C.F.R. § 1607.5(B), generated the eligible list from which the BPD made the next round of promotions. *Superior Officers*, 147 F.3d at 16.

During the course of scoring the 1992 exams, Daum raised an objection to the use of the exam scores as a pure rank order promotion mechanism. *Superior Officers*, 147 F.3d at 16. Reduced to its essentials, MAMLEO's position was that (i) the 1992 exams did not provide a measurement sufficiently refined

as to reflect valid distinctions in the qualifications of candidates who scored within certain ranges of one another on the exams; (ii) it therefore would not be valid under the Guidelines to make promotions in strict rank order of these exam scores; and (iii) such use of these exam scores would produce an adverse impact upon the plaintiff class certified by the Decree. *Id.*

Discussions among the parties concerning the proper method of ranking candidates who passed the 1992 exams continued into 1994. Like MAMLEO, the DPA advised the BPD of the adverse impact upon minority candidates that would result from the use of 1992 exam scores as a pure rank order promotion mechanism. *Superior Officers*, 147 F.3d at 16. In July 1994, the DPA suggested that the BPD use a "banding" scoring system, which would reflect the fact that candidates who scored within a certain range of one another -- there, three points -- had functionally equivalent qualifications. The BPD's initial response to this proposal was negative. On November 18, 1994, Robert C. Dumont, Personnel Administrator, wrote a letter to Commissioner Evans, reiterating the DPA's view that the 1992 exam did not provide a measurement sufficiently precise as to distinguish among the relative qualifications of candidates who scored within three points of one another on the exam.

After MAMLEO learned that the BPD intended to requisition the eligible lists for promotion to the ranks of sergeant, lieutenant, and captain, based upon the results of the 1992 exams, it presented its objection to the use of a pure rank order promotion system to the district court in the form of a Notice of Objection and Request for Scheduling Order or, in the Alternative, Motion for Temporary Restraining Order Pending Evidentiary Hearing ("Notice of Objection"). As stated in the Notice of Objection, MAMLEO's position was that, in order for promotions to be made from the 1992 eligible lists in strict rank order of exam scores, there must be empirical data showing that a higher score is sufficiently distinct, statistically, from a lower score that, as between two candidates who are each qualified for promotion by virtue of having passed the exam, the higher-

scoring individual is likely to perform better on the job than the lower-scoring individual.

MAMLEO thus objected to the use of a pure rank order promotion system as invalid under the Guidelines and likely to produce adverse impact upon minority candidates. It proposed two alternatives to strict rank order promotions: (i) a "sliding band" approach, akin to that described in the DPA's letter to Commissioner Evans; or (ii) the use of limited affirmative action, as permitted by the Decree, to enable promotions to be made without the adverse impact that would result from the use of an invalid ranking system.

In its Notice of Objection, MAMLEO stated its understanding that the BPD and the DPA were willing to continue to discuss means of addressing MAMLEO's objections to pure rank order promotions. It therefore requested that it be permitted either to try its objections immediately or to preserve its objections until after the first round of promotions were made from the 1992 eligible lists. On January 24, 1995, the district court entered an order preserving MAMLEO's objections until after the first round of promotions were made from the 1992 exams.

e. The promotion of Rafael Ruiz

Faced with the DPA's opinion that the 1992 exams did not validly distinguish among candidates who scored within a three-point range, and having been advised that strict rank order promotions would adversely impact minority candidates and, unless independently shown to be valid, would violate the Decree and the Guidelines, the BPD concluded that strict rank order promotions would adversely impact minority candidates. *Superior Officers*, 147 F.3d at 16.

The BPD expected to make 20 promotions to lieutenant from the 1992 eligible list in the first round. If a pure rank order system had been followed, 18 white officers and two black

officers would have been promoted, with a selection rate for white officers of 20% and a selection rate for black candidates of 12.5%. *Superior Officers*, 147 F.3d at 16. Thus, under a pure rank order system, the selection rate for black officers would have been 62% of the selection rate for white officers, raising a strong inference of adverse impact under the Guidelines. *Id.*; *see* 29 C.F.R. § 1607.4(D).

On the other hand, the BPD was aware that the DPA and MAMLEO had concluded that the 1992 exams did not validly distinguish among candidates who scored within three points of one another, and that the BPD could promote a third qualified black officer to lieutenant without passing over any individuals whom the test had determined to be more qualified for promotion. Promoting a third black officer also would eliminate the adverse impact that might occur if a pure rank order system were used to make the first round of promotions from the 1992 lieutenants' eligible list. As a result, the BPD accepted the DPA's determination that candidates who scored within three points of one another were equally qualified for promotion.

In February 1995, the BPD promoted 20 officers to lieutenant, three of whom were black. Of the 20 highest-scoring officers, 19 (including two black officers) were promoted in strict rank order of their exam scores, which ranged from 94 to 89. One officer who scored 90 was not promoted for reasons related to his service record. The 20th officer promoted was Rafael Ruiz, a black officer who had scored 88 on the exam. Ruiz was promoted ahead of four white offices, each of whom had scores of 89. *Superior Officers*, 147 F.3d at 16. It was undisputed that Commissioner Evans believed at the time that the Decree required the BPD to avoid a promotional decision that would result in an adverse impact under the Guidelines, and that he believed that the inclusion of a third black officer among the twenty new lieutenants was necessary to this end. *Id.* at 17.

Since February 1995, each of the individual plaintiffs in the *Superior Officers* case has been promoted to lieutenant. As

of July 1, 1996, 5 of the 77 lieutenants (5%), and 46 of 269 sergeants (17%) on the force were black. *Superior Officers*, 147 F.3d at 17.

f. The First Circuit's review of the Ruiz promotion

In the *Superior Officers* case, the First Circuit affirmed the district court's decision upholding the BPD's promotion of Rafael Ruiz out of strict rank order. The court held that, although the MAAAP Consent Decree had expired in 1995 and did not require that Ruiz be promoted, the promotion was nonetheless lawful because it was narrowly tailored to serve a compelling governmental interest. Specifically, the court found that (i) "the BPD's historic discrimination negatively affected the number of black lieutenants at the time of [the challenged] promotion"; (ii) "the BPD's past racial discrimination had manifest effects in the present status of black officers"; (iii) "[t]he effect of prior discrimination was compounded by the fact that experience makes up twenty percent of the score assigned to a candidate for promotion -- a fact that, according to both Defendants' expert and the BPD's personnel director, negatively impacts black (who were on average less experienced) candidates"; and (iv) "[t]he BPD had further justification in 1995 for race-based action in the statistical proof of a violation of the [Guidelines'] four-fifths rule." 147 F.3d at 20-21.[2/]

2. The Promotions At Issue In This Case

On October 19, 1996, the HRD administered a promotional exam for the position of sergeant within the BPD

[2/]The four-fifths rule provides that adverse impact exists if a selection rate for minority candidates is less than four-fifths (80%) of the selection rate for majority candidates. 29 C.F.R. § 1607.4(D).

("1996 Exam"). In December 1997, the BPD requisitioned 30 sergeants for promotion. The HRD subsequently certified to the BPD a list of 69 candidates who had achieved the highest scores on the 1996 Exam. *See* Pet. App. at 7a.

After the BPD identified 30 officers for promotion, in strict rank order of 1996 Exam scores, the BPD determined that (i) if the promotions were made in strict rank order of 1996 Exam scores, 29 Caucasian officers and one African-American officer would be promoted; (ii) strict rank order promotions would adversely impact African-American candidates, in violation of the EEOC Guidelines four-fifths rule; (iii) in view of this evidence of adverse impact, the BPD might be subject to a lawsuit by African-American candidates if it were to make the 30 promotions in strict rank order of 1996 Exam scores; and (iv) the adverse impact could be mitigated, and compliance with the four-fifths rule achieved, by promoting four African-American candidates within the first 30 promotions. *See id.* at 7a-8a.

Prior to making the promotions at issue, the BPD also was aware that testing experts had determined that the prior 1992 promotional exam had adversely impacted African-American candidates and could not validly distinguish among the qualifications of candidates who scored within a three-point range. In addition, the BPD was aware that testing experts and HRD had recommended the use of "banding" -- i.e., treating as equivalently qualified candidates who scored within a certain range -- as a means of mitigating the adverse impact that would have resulted from making promotions in strict rank order of 1992 Exam scores. *Superior Officers*, 147 F.3d at 24 n.5.

Under the circumstances, the BPD decided to promote the top 27 candidates in strict rank order of 1996 Exam scores (from 92-86) and to promote three African-American officers, Dennis White, Harold White, and James Johnson, who had each scored 84, rather than individuals who had scored 85. *See* Pet. App. at 7a-8a. In so doing, the BPD bypassed five officers who

had scored 85. *See id.* at 8a. No one else, including the petitioners, was affected by the decision to promote Officers White, White, and Johnson.

Because it had selected officers with scores of 84 before officers who had scored 85, the BPD was required by Massachusetts law to provide a statement to the HRD. *See* Mass. Gen. Laws, ch. 31, § 27. On December 26, 1997, the BPD wrote to the HRD, stating its intent to promote three African-American officers who scored 84 on the 1996 Exam ahead of six Caucasian officers with scores of 85. *Cf. Superior Officers*, 147 F.3d at 24 (noting HRD's determination that, with respect to 1992 promotional exams, candidates who scored within three points of one another were "equally qualified"). The BPD stated that it had selected Officers White, White, and Johnson in order to ensure "compliance with current EEOC guidelines and applicable federal and state discrimination laws." *See* Pet. App. at 9a. *Cf. Superior Officers*, 147 F.3d at 21 (affirming BPD's determination that promotions in strict rank order would have supported inference of discriminatory impact under EEOC Guidelines).

HRD's Hartnett, believing that the BPD had relied on an expired consent decree in selecting Officers White, White and Johnson out of strict rank order, did not accept the BPD's justification for these promotions. *See* Pet. App. at 9a. Faced with the HRD's position, the BPD promoted all candidates in strict rank order from the highest score through score 85, as well as Officers White, White, and Johnson. *Id.* The petitioners, who also scored 84 on the 1996 Exam, were not promoted to sergeant. *Id.* at 6a.

The persistent effects of past discrimination within the BPD were manifest in 1996, as evidenced by, *inter alia*, a highly significant statistical disparity between African-American and non-African-American sergeants: On October 23, 1996, African-Americans comprised 25.02 percent of the BPD's 1547 officers, but only 16.49 percent of the BPD's sergeants. Pet.

App. at 20a. In order to rectify this discrepancy, the BPD would have to have promoted 20 additional African-Americans, rather than the three officers who were promoted. *Id.* at 23a

The continuing effects of past discrimination within the BPD also are evidenced by statistical proof of adverse impact, in violation of the Guidelines' four-fifths rule, had the BPD made promotions in strict rank order, as the BPD itself had found at the time of the challenged promotions. Pet. App. at 21a. Had the BPD made promotions in strict rank order, the selection ratio for African-American candidates would have been 20% (3%, the African-American selection rate, divided by 15%, the majority selection rate), well below the 80% threshold set by the Guidelines, giving rise to an inference of significant adverse impact. *Id.*

In her expert report, Dr. Kathleen Lundquist concluded that the 1996 Exam adversely impacted African-American test-takers. Pet. App. at 80a-81a. In spite of this adverse impact, the 1996 Exam had not been shown to be content validated under the Guidelines. *Id.* at 79a. Dr. Lundquist, moreover, determined that the selection procedure used by the BPD to make promotions from the 1996 Exam mitigated to the greatest extent possible the adverse impact of the 1996 Exam on African-American candidates for sergeant. *Id.* at 87a.

Since the promotions at issue were made, the BPD has not made any further promotions to sergeant from the 1996 Exam, and all subsequent promotions to sergeant have been made in strict rank order of test scores, except for bypasses for cause. Pet. App. at 42a.

REASONS FOR DENYING THE WRIT

The petition for writ of certiorari should be denied because, in the decision below, the First Circuit correctly stated and applied the governing law; because there is no conflict between the decision below and the decisions of any other circuit

court of appeals; and because the state-law questions presented for review by the petitioners are not properly before this Court. *See* Supreme Court Rules 10, 11.

1. It is well settled that public employers may constitutionally use race-conscious affirmative action if it is narrowly tailored to serve a compelling governmental interest. *E.g.*, *Adarand Constr., Inc. v. Pena*, 515 U.S. 200, 237 (1995); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-78 (1986).[3/] *See also Grutter v. Bollinger*, — U.S. — , ___, 123 S. Ct. 2325, 2337-38 (2003). The essential inquiry under the compelling interest test is whether the public employer had a "strong basis in evidence for its conclusion that remedial action was necessary." *Wygant*, 476 U.S. at 277; *Stuart*, 951 F.2d at 449-50. *See Superior Officers*, 147 F.3d at 20 ("[T]he basic question" in determining whether a compelling government interest exists "is an evidentiary issue: Is there a '*strong basis in evidence*' for the conclusion that the [government action] here at issue serve[d] a remedial purpose with respect to past discrimination."). A public employer has the requisite "firm basis" for believing that remedial action is necessary if there is a statistical disparity between the racial composition of the workforce and the relevant, qualified employment pool. *Wygant*, 476 U.S. at 292

[3/]In addition, this Court has "on numerous occasions recognized that Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII." *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986). "The value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance." *Wygant*, 476 U.S. at 290 (O'Connor, J., concurring). . "Indeed, [the Court's] recognition of the responsible state actor's competency to take these steps is assumed in [the Court's] recognition of the States' constitutional *duty* to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination." *Id.* at 291.

(O'Connor, J., concurring); *Stuart*, 951 F.2d at 450-53. "[A] contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan." *Wygant*, 476 U.S. at 289 (O'Connor, J., concurring)

a. The First Circuit correctly held that the undisputed facts demonstrate that the BPD had the requisite "strong basis in evidence" to support the conclusion that race-conscious relief was necessary in order to remedy the present effects of the BPD's past discrimination. Pet. App. at 17a-22a. The court first found that "[t]he [BPD]'s history of discrimination is well-documented by past litigation and records." *Id.* at 18a.

The First Circuit then determined from the undisputed evidence that the BPD "was faced with facts that its efforts at remedying past discrimination had not been successful," and that the effects of the BPD's past discrimination were manifest at the time the challenged promotions were made. Pet. App. at 20a. Specifically, the court found that in "October, 1996 (the latest date before the African-American Officers were promoted for which data is available), African-Americans comprised 25.02% of the BPD's 1,547 officers, but only 16.49% of the BPD's sergeants."[4/] *Id.* The court held that "[t]his difference is statistically significant, and not reasonably attributed to chance.

[4/]Although the petitioners contend that, in making the challenged promotions, the BPD was establishing a "quota" of "16.17%" African-American sergeants, *see* Pet. at 7, the petitioners introduced no evidence of such a quota in the proceedings below. In all events, and as the First Circuit recognized, the undisputed record demonstrates that "there were no quotas or long-term guidelines established, and there is nothing in the [*Superior Officers*] decision requiring affirmative action in future decisions." Pet. App. at 24a.

This disparity is not just a simple assurance of good intention from the City, but concrete evidence that discrimination existed at the time the African-American Officers were promoted." *Id.*

The First Circuit also determined that, "[h]ad the BPD promoted in strict rank order, the selection rate for African-Americans would have been three percent . . . and the selection rate for non-African-Americans would have been fifteen percent . . . , for a selection ratio of twenty percent . . . . This result is well below the eighty percent guideline established by the EEOC." Pet. App. at 7a-8a n.3, 21a. Thus, the court concluded: "In this case, the selection ratio . . . indicat[es] that the City had not yet remedied past discrimination." *Id.* at 21a.

Under the governing law, the undisputed evidence amply demonstrates that the BPD had a "strong basis" for its conclusion that remedial action was warranted. *E.g.*, *Majeske v. City of Chicago*, 218 F.3d 816 (7th Cir. 2000) (upholding constitutionality of race-based promotions based on statistical evidence of past discrimination); *Superior Officers*, 147 F.3d at 22-23 (statistical disparity and judicial findings of past discrimination showed that past discrimination affected the promotion of minority candidates and that the lingering effects of that discrimination were present at the time of the challenged promotion, justifying the BPD's non-rank-order promotion of African-American candidate); *Mackin v. City of Boston*, 969 F.2d 1273, 1277 n.3 (1st Cir. 1992) (even if exam was nondiscriminatory, "the paucity of minority representation in the [BPD] betokened a failure to achieve the central goal of the decree, thus negating any argument that the purposes of the decree had been achieved").

In sum, the First Circuit, in the decision below, correctly applied well-established law to the undisputed facts in determining that the challenged promotions were made to serve a compelling governmental interest. The petitioners fail to offer a cognizable basis for further review of that decision by this Court.

b. Proof that a remedy is narrowly tailored "means, as a practical matter, that it discriminates against whites as little as possible consistent with effective remediation." *McNamara v. City of Chicago*, 138 F.3d 1219, 1222 (7th Cir. 1998). This Court has identified several factors to consider in determining whether race-conscious measures are narrowly tailored, including the necessity for relief; the efficacy of alternative remedies; the flexibility and duration of the relief; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties. *United States v. Paradise*, 480 U.S. 149, 171 (1987). In determining that the promotions challenged in this case were narrowly tailored, the First Circuit correctly applied these well-established principles, as previously elucidated in its decisions in *Superior Officers*, 147 F.3d at 23-25, and *Mackin v. City of Boston*, 969 F.2d at 1278.

The court first concluded that "[o]nly qualified minorities were promoted" and that "they were therefore not 'specially,' or unfairly advantaged by their promotions." Pet. App. at 23a. Next, the court found that, because "[a]ll officers were competing for a limited number of spots . . . , the City's promotion of the African-American Officers did not disturb any legitimate, firmly rooted expectations of the [petitioners]." *Id.* The court further determined that, "[h]ad the City not considered race in the promotions, only thirty promotions would have been made -- twenty-nine Caucasian officers and one African-American officer. As a result of the affirmative action plan, those same twenty-nine Caucasian officers were promoted" and "no additional Caucasian officers would have been [promot]ed." *Id.* at 23a & n.9 (citation omitted).

The First Circuit then found that "[n]o valid policies have been disturbed by [promot]ing three qualified African-American sergeants. While Massachusetts law requires an explanation for promotions made outside of strict rank order, there is no prohibition on such out-of-rank decisions." Pet. App. at 24a (citing Mass. Gen. Laws ch. 31, § 27).

Finally, the court held that "there were no quotas or long-term guidelines established, and there is nothing in the decision requiring affirmative action in future decisions. The decision is therefore limited in scope and duration." *Id.*

The First Circuit correctly applied the governing law to the undisputed facts in concluding that the challenged promotions were narrowly tailored. The decision below does not conflict with any decision of another circuit court of appeals and does not warrant further review by this Court.

c. To the extent that the petitioners claim error in the First Circuit's strict scrutiny analysis, the arguments fail to demonstrate that further review by this Court is warranted.

i. The petitioners take issue with the First Circuit's consideration of what they claim are impermissible "after the fact" justifications for the challenged promotions. Pet. at 20-27. As a threshold matter, evidence of the invalid nature of promotional examinations is not "after the fact" in the sense alleged by the petitioners. At a minimum, the undisputed facts demonstrate that, prior to making the challenged promotions, the BPD determined that strict rank order promotions from 1996 Exam scores would adversely impact African-American candidates. Pet. App. at 20a.

The petitioners' "after the fact" argument also reads too much into *Shaw v. Hunt*, 517 U.S. 899 (1996). In contrast to *Shaw*, in which there was "little to suggest that the legislature considered the historical events and social-science data that the reports recount," 517 U.S. at 910, here, the BPD did not act without contemporaneous factual justification. Furthermore, every circuit court that has directly addressed the question of "post-enactment evidence" has held that it is admissible. *See Adarand Constr., Inc. v. Slater*, 228 F.3d 1147, 1166 & n.11 (10th Cir. 2000), *cert. dismissed as improvidently granted sub nom. Adarand Constr., Inc. v. Mineta*, 534 U.S. 103 (2001); *Schurr v. Resorts Int'l Hotel, Inc.*, 196 F.3d 486, 498 n.12

(3d Cir. 1999); *Engineering Contractors Ass'n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895 (11th Cir. 1997), *cert. denied*, 523 U.S. 1004 (1998); *Concrete Works of Colorado, Inc. v. Denver*, 36 F.3d 1513 (10th Cir. 1994); *Contractors Ass'n of Eastern Pennsylvania v. Philadelphia*, 6 F.3d 990 (3d Cir. 1993); *Harrison & Burrowes Bridge Constr., Inc. v. Cuomo*, 981 F.2d 50 (2d Cir. 1992); *Coral Constr. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991).

ii. Relatedly, the petitioners argue, as they did unsuccessfully below, that proffering multiple compelling governmental interests puts the BPD "in a constitutionally indefensible position." Pet. 24. This argument fails for numerous reasons.

First, in providing a statement to HRD concerning the challenged promotions, the BPD was (i) acting with respect to the selections of Officers White, White, and Johnson vis-à-vis the candidates from the 85 test category, rather than the candidates from the 84 category and (ii) attempting to comply with a reporting obligation imposed by Massachusetts civil service law, rather than seeking to justify its actions under the United States Constitution. When the BPD learned that the HRD would not accept its justification for promoting Officers White, White, and Johnson before promoting candidates from the 85 test category, it took action that it reasonably believed was lawful without providing further justification to the HRD. That is, in taking action to promote officers from the 85 test category in addition to promoting Officers White, White, and Johnson, thereby promoting 36 candidates in strict rank order of exam scores, the BPD had no reason to believe that any further justification was required as a matter of state or federal law.

Moreover, the fact that the BPD provided a statement to the HRD in order to satisfy a requirement of state civil service law does not mean that the BPD did not act for other reasons as well. *See Superior Officers*, 147 F.3d at 23. As the First Circuit correctly recognized in the decision below, a "governmental

actor may have several reasons for racially-motivated action; if any legitimate reason satisfies strict scrutiny, the action is constitutional." Pet. App. at 17a n.7.

Furthermore, even if the BPD's justifications for the challenged promotions are limited to those stated in its communications with the HRD, the BPD's effort to ensure compliance with current EEOC Guidelines and applicable federal and state discrimination laws clearly encompasses at least the City's need to remedy its past discrimination and to mitigate the adverse impact against African-American candidates that would have resulted from strict rank order promotions.

iii. The petitioners make the bald assertion, for the first time, that the disparity between the percentage of sergeants who are African Americans (16.49%) and the percentage of police officers who are African Americans (25.02%) "results directly from the implementation of the Consent Decree entered in *Castro v. Beecher* . . . ," *see* Pet. at ii, or the MAAAP Consent Decree discussed above, *see id.* at 5. The petitioners further contend, without developed argument, that this disparity was not "concrete evidence of discrimination." *Id.* at iii, 5.

Contrary to the petitioners' representations, the consent decree entered in *Castro v. Beecher*, 365 F. Supp. 655 (D. Mass. 1973), which governs the BPD's ***hiring*** of patrol officers, is not the same consent decree that was entered in *Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Dep't*, No. 78-529-McN (D. Mass. 1980), which governed the BPD's ***promotions*** of officers to sergeant until its expiration in 1995.

Just how either consent decree could be the root cause of the discrimination that the BPD sought to remedy in making the challenged promotions is unexplained, and, indeed, wholly unsupportable. In all events, because the issue was not litigated below, it provides no basis for further review by this Court. *See EEOC v. Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986) (noting that this Court ordinarily declines to address issues not

raised in the court of appeals); *Kosak v. United States*, 465 U.S. 848, 850 n.3 (1984) (stating that this Court will not consider arguments not presented to the court of appeals).

iv. The petitioners erroneously suggest that the First Circuit decided the same disparity issue differently in *Quinn v. City of Boston*, 325 F.3d 18 (1st Cir. 2003). *See* Pet. at ii-iii, 5. In *Quinn*, however, the First Circuit never addressed the question whether a disparity between the number of minorities in entry-level and supervisory positions was evidence of discrimination in making promotions and specifically declined to answer the question whether "unconstitutional hiring practices within the [fire department] have caused a disparate impact on the number of minorities in the higher echelons." 325 F.3d at 34. Instead, the First Circuit merely considered -- in comparing the number of minority firefighters with the number of minorities in the City -- whether the term "firefighters," as used in the consent decree at issue in that case, included all minorities in the fire department or just those in entry-level positions. *Id.* at 29. This is to say nothing of the facts that the promotions challenged in the case at bar were not based upon a consent decree, let alone the same consent decree at issue in the *Quinn* case, and that the BPD's promotions to sergeant were not governed by the one-to-one hiring scheme at issue in *Quinn*.[5/]

The petitioners' spurious claim that the different results reached in these two cases is owed solely to the "luck of the draw," Pet. at 5, provides no basis for granting the petition.

[5/]The consent decree described in *Quinn* governed hiring and recruitment of fire department personnel; was established in 1974; and remained in effect at the time the plaintiffs in that case filed their complaint. *See Quinn*, 325 F.3d at 23-24. As noted above, the MAAAP Consent Decree that formerly governed the promotion of sergeants within the BPD was entered in 1980 and expired by its terms in 1995.

Although they could have filed a timely petition for rehearing en banc to challenge the *Cotter* decision in light of the *Quinn* decision, the petitioners chose not to do so. Pet. App. at 99a-100a. In all events, a conflict between decisions of different panels of the same court of appeals does not warrant certiorari review. *See Davis v. United States*, 417 U.S. 333, 340 (1974).

v. The petitioners' contention that the failure to eliminate adverse impact altogether means that the challenged promotions were not narrowly tailored, *see* Pet. at 21, provides no basis for granting further review. First, the BPD's determination that strict rank order promotions would have adversely impacted African-American candidates is evidence of why the BPD decided to make the challenged promotions. The Constitution does not require proof of the ultimate correctness of the conclusion that remedial action was warranted in order to justify race-conscious affirmative action. *See Wygant*, 476 U.S. at 277; *id.* at 289-91 (O'Connor, J., concurring); *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1565-66 (11th Cir. 1994) (collecting cases). Nor does Title VII require that an employer eradicate adverse impact completely, and in the event it cannot do so, take no ameliorative action at all. It could not be more plain that such a rule would lead to absurd results, and is wholly antithetical to the Fourteenth Amendment and the purposes and policies of Title VII.

d. The petitioners contend that the First Circuit erred in determining that they did not have standing to pursue a claim for damages against the City. Pet. at 11-16. This argument provides no basis for granting further review because the petition points to no conflict among the courts on this issue, and because the First Circuit correctly stated and applied the governing law in determining that the petitioners did not have standing to pursue a claim for damages.

In *Texas v. Lesage*, 528 U.S. 18 (1999), this Court held that a plaintiff fails to establish the existence of a cognizable injury under 42 U.S.C. § 1983 "where a plaintiff challenges a

discrete government decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless." 528 U.S. at 21. The First Circuit determined that the petitioners would not have been promoted, even if the BPD had not considered race in making the promotional decisions at issue, and correctly applied this Court's decision in *Lesage* in holding that the petitioners did not have standing to pursue a claim for money damages. *See* Pet. App. at 12a-13a.[6/]

The petitioners attempt to escape *Lesage* by arguing that the First Circuit's conclusion that they had suffered no cognizable injury under 42 U.S.C. § 1983 is erroneous because the class sizes of 30 and 36 were "illegal" under state law. Pet. at 11. This argument is based primarily upon stipulations contained in the joint motion of the petitioners and Hartnett for entry of an order for declaratory judgment ("Joint Motion"), which was granted, only in part, by the district court on January 14, 2002. *See* Pet. App. at 99a-100a.

The argument is without merit. First, none of the stipulations recited in the Joint Motion constitutes a litigated, established fact. Indeed, the City and MAMLEO contest the basis for many of the stipulations and opposed the Joint Motion in the district court. Second, the district court specifically denied that portion of the Joint Motion to which the petitioners look for

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[6/]The petitioners erroneously claim that the district court "found that the Petitioners' *rights had been violated*, and were likely to be violated again because of the use of race in the promotion process," Pet. at 3, and that "the district court affirmed that [they] had standing and *were injured*," *id.* at 10 (emphases supplied). The district court merely found that the petitioners had met the requirements necessary to establish standing. *See* Pet. App. at 53a. The district court, in entering judgment in favor of the defendants-respondents, clearly decided that the petitioners' rights had *not* been violated. *Id.* at 97a-98a.

support. *See* Pet. App. at 100a. Third, the stipulations may not be used against a litigant that is not a party to the settlement. Fed. R. Evid. 408. *See Kennon v. Slipstreamer, Inc.*, 794 F.2d 1067, 1069 (5th Cir. 1986) ("Where the evidence offered favors the settling party and is objected to by a party not involved in the settlement, [Federal Rule of Evidence] 408 *bars the admission of such evidence* . . . ."). Here, the petitioners would offer the stipulations for the sole purpose of proving the City's liability, a wholly impermissible use of such evidence under Rule 408.

The petitioners' complaint, moreover, asserts claims for alleged violations of ***federal*** law, whereas the stipulations contained in the Joint Motion, as well as the proposition cited by plaintiffs from the district court's order on motion to dismiss, are based solely upon a ***state*** statute, Mass. Gen. Laws ch. 31. The complaint does not even mention Mass. Gen. Laws ch. 31, let alone assert a claim for relief predicated upon an alleged violation of that statute. Though the petitioners claim that the promotions at issue violate state law, both the First Circuit, *see* Pet. App. 24a, and the district court, *see* Pet. App. at 91a-92a, disagreed.

Even if the complaint had raised a claim for relief under state law, however, such a claim would not allow plaintiffs to recover, as it is well settled that 42 U.S.C. § 1983 does not provide a cause of action for alleged violations of state law. 28 U.S.C. § 1343(3). *See Graham v. Connor*, 490 U.S. 386, 393-94 (1989); *Paul v. Davis*, 424 U.S. 693, 700 (1976); *Fournier v. Reardon*, 160 F.3d 754, 757-58 (1st Cir. 1998); *Soto v. Flores*, 103 F.3d 1056, 1061 (1st Cir. 1997). Thus, the district court's decision on Hartnett's motion to dismiss (which, in any case, is not a decision on the merits) and the stipulations contained in the Joint Motion are irrelevant.

In sum, further review of the decision below is unwarranted because the First Circuit correctly stated and applied the governing law in determining that the petitioners did not have standing to pursue a claim for damages. Moreover,

even if the First Circuit's conclusion as to standing were incorrect, further review by this Court is unnecessary because the First Circuit's decision that the petitioners' constitutional rights have not been violated would be no different, even if the First Circuit had held that the petitioners ***did*** have standing to pursue a claim for damages.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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